SECOND PART.

THE PRIVILEGE

OF THE

WRIT OF HABEAS CORPUS

UNDER

THE CONSTITUTION.

C. Sherman & Son, Printers, Philada.

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PHILADELPHIA:

JOHN CAMPBELL, PUBLISHER,

419 CHESTNUT STREET.

1862.

PREFACE.

THE principal object of the following paper, is to confront a doctrine of certain writers, that the Habeas Corpus clause in the Constitution does not give power to anybody to suspend the privilege of the Writ, but is only restrictive of the otherwise plenary power of Congress, to withhold, suspend, or repeal the Writ of Habeas Corpus at their mere discretion or pleasure. If the Constitution does not give Congress such a power, it seems to be admitted that the power of suspension is given by the Habeas Corpus clause.

The notice of some objections to the deduction of the power from that clause to the Executive department, which follows the principal topic, is not intended to be a restatement of the argument in the former Tract; but only as a short answer to some popular suggestions, which have no legal value in the interpretation of the clause, but which from their more frequent repetition seem to be thought the most effectual.

HORACE BINNEY.

PHILADELPHIA, April 10th, 1862.

THE PRIVILEGE OF THE WRIT.

SECOND PART.

THE objections which have been made to the Tract entitled "The Privilege of the Writ of Habeas Corpus under the Constitution," whether argued or dogmatized, and whether pertinent or not to the principal matter in question, may, so far as it is intended to notice them in this paper, be included under the following heads:

1. That the Habeas Corpus clause in the ninth section of the First Article of the Constitution of the United States, does not give authority or power to anybody; that it is merely restrictive of powers given elsewhere in the Constitution; that Congress have other powers under the Constitution by which suspension of the Habeas Corpus might have been authorized by that body at their pleasure, and under any circumstances, if the clause in the ninth section of the First Article had not been adopted; and that the clause is merely a restraint upon the exercise of those other powers by Congress.
2. That the President has no authority under the Constitution to issue a warrant of arrest and imprisonment, and therefore, cannot decree the power of arrest and suspension without authority from Congress.
3. That the debates in the State Conventions which ratified the Constitution, prove that the clause was adopted as meaning that Congress alone had authority to suspend the privilege of the Writ.
4. That the Bills of Rights in the State Constitutions which have the same clause, or clauses of like meaning, prove that the Legislature alone was deemed to possess the authority.

5. That the State Bills of Rights which declare the fundamental principle, that the suspension of Laws, except by the Legislature, or under their authority, is illegal, prove the same thing.

OBJECTION I.

The first objection is both pertinent and important. It was not overlooked in the preceding Tract, but was denied, and left for assertion and proof. If it is sound, it materially disables the argument which regards the Habeas Corpus clause as a grant of authority. If it is unsound, it leaves the interpretation of the meaning of the clause, as it was stated in the Tract, without any answer. In that case the clause must give authority or power to somebody; and to whom it gives the authority, must depend upon other considerations.

The objection is an affirmative one, and puts upon the writer who makes it, the duty of proving it. This is not distinctly denied by anybody, but is tacitly assumed by the objectors; and it becomes necessary therefore to exhibit, as fairly, and as nearly in the words of the objectors as possible, their affirmations and their proofs.

A *Louisville* writer* states his position, and presents his supposed proofs, in these words:

"There is a short process by which to eviscerate the very *gist* of the question, which seems not yet to have been applied, simple and obvious as is that process. Let us suppose the Constitution wholly silent on the subject, saying not one word about the Writ, or its suspension; where then would have been the power to suspend? No intelligent, candid man will pretend that it would not be clearly, indisputably, with Congress, or that by any possible fair construction the power could be assigned to the President."

The President's power is not the present question, but the power of Congress, and the effect of the absence of the Habeas Corpus clause from the Constitution. The writer proceeds:

"This conceded, then let it be remembered that the clause is

* Habeas Corpus. The Law of War and Confiscation. By S. S. Nicholas. Louisville, 1862.

a restrictive and not an enabling one. Without the restriction, Congress would have had plenary power, untrammelled discretion over the Writ. It could have created the Writ, or not, at its pleasure, suspended, or wholly repealed it out of existence, whenever, and as often as it thought proper."

The proposition contained in the short process is not conceded, but was the matter to be proved, and the whole matter; and therefore, thus far the whole proof of the proposition is in the writer's assertion, and in the supposed concession. He proceeds:

"Here, then, this full power, this full discretion over the Writ, was what had to be restrained, to accomplish the plain purpose of the clause, that is, placing the citizen's privilege of using the protection of the Writ upon a surer, more permanent basis, than it stood in England, where it rests upon the untrammelled discretion of Parliament. Who, then, was intended to be restrained by this clause? Surely not the President, who, under such silence of the Constitution, would have had no possible control over the Writ in any circumstances whatever. There could be no necessity to restrain his power, when he would have none to be restrained. Full surely it must have been intended to restrain Congress, which alone and exclusively would have had the power."

Thus end the affirmation and the proof. What follows from the objector, he calls "confirmation," "if it needed confirmation." It is not difficult to infer or conclude anything, if a writer is permitted to prove his fundamental proposition by asserting it, or by supposing it to be conceded. The matter to be proved was the power of Congress, their "plenary and untrammelled" power over the Writ; and the assertion of that plenary power is all the proof, and the concession of that, is the root of all that follows. The writer proceeds:

"If this plain view needed confirmation, it could be found in a contemporaneous discussion in the Virginia Convention. Patrick Henry contended that the restrictive or prohibitory clauses, created by implication powers not specially given, contrary to the assertion of the advocates of the Constitution, that the Government would have no power but what was specially granted. He referred to the Habeas Corpus clause, and said:

'It results, clearly, that if it had not said so, they could have suspended it in all cases whatever.' Governor Randolph, to whom the country is more indebted for the Constitution than to any other member of the Federal Convention, except Charles Pinckney, answering Henry, said: Gentlemen, suppose from the negative restrictions, that Congress is to have powers by implication. I will meet them on that ground. I persuade myself that every exception here mentioned, is an exception, not from general powers, but from the particular powers therein vested. To what power is the exception made to the importation of negroes? Not from a general power, but from a particular power expressly enumerated. This is an exception from the power given of regulating commerce. He asks where is the power to which the prohibition of suspending the Habeas Corpus is an exception. I contend, that, by virtue of the power given to Congress to regulate the courts, they could suspend the Writ. This is therefore an exception to that power."

Thus closes the argument of the writer, that the Habeas Corpus clause is merely restrictive, and gives no power.

So far as the argument between Patrick Henry and Governor Randolph is concerned, it is an averment by Henry that the restrictive clauses created power by implication, and a call by him for the power to which the prohibition of suspending the Writ of Habeas Corpus was an exception; and on the part of Randolph, it was a denial of the averment, and an argumentative assertion on his part, that the power was to be found in the power given to Congress to regulate the courts. Governor Randolph said that he *contended* that it was, and he said no more.

The answer to this objection might be much shorter than we shall make it. The objection is not proved at all. There is not a shadow of proof in any part of the quotation. The dispute between Henry and Randolph was a wrestling-match, a metaphysical disputation about general and particular powers, one of a class of questions interesting, perhaps, to the Convention of Virginia, but of little use in the practical construction of the Constitution. Pressed in an argument by his adversary, Mr. Randolph resorted for defence to an assertion, which he contended was true, but did not attempt to prove it. It is not necessary to examine the personal authority of Mr. Randolph

on such a point, or on any other. He has no such name, either as delegate to the Convention, or as Attorney-General first, and then Secretary of State, under Washington, as to dispense with higher proof of the proposition he contended for.

The answers to the position of the Reviewer, which we are under no obligation to give, for he has only asserted, and not proved anything, are these:

1. The Constitution gives no such power to Congress, as *a power to regulate the Courts.*

A resort to indefinite language is the common artifice of a deficient argument; and so it has occurred here. The word "regulate," or any one of its derivatives, cannot be found in the Constitution, in the grant of judicial powers, or in any clause which relates to judicial tribunals, except in a single instance, which regards the *appellate* jurisdiction of the Supreme Court. In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Third Article of the Constitution says the Supreme Court shall have original jurisdiction. In all other cases before mentioned, that is to say, those to which the judicial power of the United States extends, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such *regulations*, as the Congress shall make. This is the only instance in which the word is used in the judicial relation. The regulation by Congress of this appellate jurisdiction, so far as consists with the existence of that jurisdiction which the Constitution says the Supreme Court shall have, may be admitted. It is unnecessary to look at the limitations of the power. The appellate jurisdiction of the Supreme Court is the only subject to which the power of regulation by Congress applies.

2. The judicial power of the United States does not depend at all upon the discretion or regulating power of Congress. The Constitution declares that it *shall* extend to all the subjects, cases, and controversies which are enumerated or described in the instrument. Congress cannot add to it nor diminish it. In the only instance in which the judicial power was deemed to extend too far, the power of sustaining suits against the States, it was abridged, and could only be abridged, by an amendment of the Constitution.

The judicial power of the United States extends to every question of personal liberty which arises in any subject, case, or controversy, to which the power extends—to imprisonment to which the United States is a party—to which there are any parties in a case or controversy, within the jurisdiction of the power. Congress cannot take this power away, or diminish it.

The judicial power of the United States is vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. Congress have by this language a discretion as to the number, order and jurisdiction of the inferior courts; but they have no discretion whatever as to vesting or not vesting the whole judicial power of the United States in courts of some description.

The very broad assertion of Congressional power and discretion, which lies at the foundation of the objection we are considering, has been made in a judicial controversy, and received a judicial answer, in *Martin* v. *Hunter*, 1 Wheaton; *Story on the Const.*, sec. 1590, &c., 3d edit. "If Congress possess any discretion on the subject, it is obvious that the Judiciary, as a co-ordinate department of the government, may at the will of Congress be annihilated, or stripped of all its important jurisdiction; for if the discretion exists, no one can say in what manner, or at what time, or under what circumstances, it may or ought to be exercised."—"The language of the Third Article throughout" (the judicial article), "is manifestly designed to be mandatory upon the Legislature. Its obligatory force is so imperative, that Congress could not, without a violation of its duty, have refused to carry it into operation. The judicial power of the United States *shall* be vested (not may be vested) in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish. Could Congress have lawfully refused to create a Supreme Court, or to vest in it the constitutional jurisdiction? The judges both of the Supreme and inferior Courts *shall* hold their offices during good behavior, and *shall* at stated times receive for their services a compensation, which shall not be diminished during their continuance in office. Could Congress create or limit any other tenure of the judicial office? Could they refuse to pay at stated times, the stipulated salary, or diminish it during the

continuance in office?"—"The judicial power must therefore be vested in some Court by Congress; and to suppose that it was not an obligation binding on them, but might at their pleasure be omitted or declined, is to suppose that under the sanction of the Constitution they might defeat the Constitution itself. A construction which would lead to such a result cannot be sound."

—"If, then, it is the duty of Congress to vest the judicial power of the United States, it is a duty to vest the whole judicial power. The language, if imperative as to one part, is imperative as to all. If it were otherwise, this anomaly would exist, that Congress might successively refuse to vest the jurisdiction in any one class of cases enumerated in the Constitution, and thereby defeat the jurisdiction as to all; for the Constitution has not singled out any class on which Congress are bound to act in preference to others."

The excellent sense of this judgment, it may be observed, need be developed, but a single step further, to demolish the very foundation upon which the objection of Judge Nicholas is built.

The duty having been thus prescribed to Congress by the Constitution, an express power is given to Congress in the Eighth Article, to perform it, and to execute the mandate. "The Congress shall have power—to constitute tribunals inferior to the Supreme Court."

The obligation to vest the judicial power, and the whole judicial power, in tribunals of some description, being mandatory, it follows necessarily, that it is equally mandatory upon Congress, to constitute the tribunals, in which, together with a Supreme Court, the whole judicial power shall be vested.

The whole question that remains, is what is meant by *constituting* tribunals. It clearly can mean nothing else, than to erect judicial tribunals or courts, and to give them such constitution or organization, as will enable them to exercise the judicial powers vested in them. The mere erection of a tribunal by name is nothing. The erection of a court, and vesting jurisdiction and judicial power in it, would be nothing, without more. A judicial tribunal is not constituted, unless it is endued with the active powers which are necessary to the exercise of its judicial powers. It must have the means of bringing parties before

it, in order to hear them; in some cases, to bring the subject in dispute before it, or within its power; and after hearing and judging, to enforce and execute its judgments and decrees. It must have the power of issuing writs, of committing to officers its mandates to be executed, in just such kind, number, and variety, as its judicial powers demand. These it must have, to be constituted a judicial tribunal.

To admit that it is mandatory upon Congress to create tribunals, in which the whole judicial power may vest, and yet argue that it is within the absolute discretion of Congress to give or to withhold the instrumental powers which are indispensably necessary to the exercise of the whole, is to argue without color or semblance of reason. Those instrumental powers are part of the constitution of a judicial tribunal. Congress cannot withhold or take away any one of them, that is necessary, unless they supply another, without destroying, for the term of this privation, the exercise of the judicial power to that extent. If Congress can do this in any one case, they may successively do it in a class, and in every class, of cases, and defeat the jurisdiction in all. The Constitution has not singled out any class or case in which Congress may so act at their plenary and untrammelled discretion.

Congress executed this duty faithfully, in words completely corresponding with the extent and necessities of the judicial power: "All the beforementioned courts of the United States shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."—*Act to establish the Judicial Courts of the United States*, 24 Sept. 1789, sec. 14. Congress needed not to give any more, they could not give any less, than those writs which were *necessary*. The very word adopts and confirms the argument. There is no power of Congress which touches or can touch the co-ordinate power of the Judiciary. They can only sustain it by constituting courts for the exercise of it. The Judiciary is an independent department throughout. It is created and established by the Constitution. The Legislature, so far as regards this department, is the organ or agent of the Constitution, to give the

judicial power its place of abode or seat, and its active powers. The instrumental power of Congress is a trust for this purpose. Congress have, in this matter, no discretion. Congress can no more withhold tribunals, than withhold the vesting of judicial power—no more withhold the instruments by which the tribunals can act, than withhold the tribunals—no more do any of these things, than lawfully abdicate or defeat the Constitution.

The error, the vulgar error, of Governor Randolph, was in not distinguishing between instrumental or mechanical power, and constitutional or moral power. Everything that it is the province of legislation to do, the Legislature or law-making power alone is competent to do; and the Legislature may in one sense act or not act at its pleasure. But the Legislature is also a moral and constitutional power, and cannot by any form of law effectually do anything that is contrary to the mandate of the Constitution, nor omit to do what it is commanded to do by the Constitution. It may affect to do the wrong thing, but it cannot do it effectually. It may omit to do the right thing, but it violates the command of its creator by so omitting, and brings on the destruction of its own being. There are infinite things which are within its discretion to do or not to do; but to give the necessary organization to the Judicial department, is not within its discretion to do or not to do, for that would have been a discretion to destroy the Constitution. Congress are constitutionally bound to do what is necessary to enable the Judicial department to exercise its powers. It is the condition upon which their own co-ordinate power exists. Forms of process and execution they may select; but they must select such as will enable the courts to exercise their whole judicial power. Whether they will grant to the courts the Writ of Habeas Corpus, may be so far within the discretion of Congress, as that they may substitute a writ or writs of another name, of equivalent authority or command. Writs are the arms and hands of the judicial power. They are the instruments by which alone it touches the parties and subjects of its power. It can command nothing and enforce nothing without them. The judicial power without them would be paralytic in every limb, or rather it would have no limbs. It would be a living power in the intellect, but inert and dead in its capacity to act, or to execute the judgments of its intellect. Congress violate the com-

mand of the Constitution, if they do not constitute the judicial tribunals with these means of exercising their judicial powers and jurisdiction in cases or controversies involving imprisonment and personal liberty within their jurisdiction, and especially with the means of that great Writ which Mr. Hallam has called "the principal bulwark of English liberty." The want of that Writ, or of an equivalent one, would strike that principle from the protection of the Judicial department of the Government and of the Constitution.

If Congress could take this Writ away forever or for a day, or withhold it altogether, the same thing might be done with writs or process necessary to exercise judicial power and jurisdiction in cases involving personal security, and personal or real property—in fine, with every necessary instrument of action, in every case to which the judicial power extends. Such failures of duty would be nothing less than not constituting the tribunals, which Congress are commanded to constitute; for without such powers of action the Courts would have no constitution at all. They would have neither life nor action, in which judicial power consists.

How inconsiderate is this attribution of plenary and untrammelled discrétion to Congress, in any case where a mandate of the Constitution requires that body to act to a certain and definite end. The mandate is the trammel. The power in such cases is a trust to act; and a trust to act, created by the Constitution, is a command to act, and is violated by not acting, or by acting in opposition to the end and purpose of the trust and command. If the instrumental power of legislation is subject to an untrammelled discretion in such cases, Congress may repeal the whole Judiciary Act and pass no other—refuse to make an appropriation for the salary of a single judge—refuse to appropriate for any of the expenses of the department. If this be constitutional, Congress may constitutionally destroy the Constitution.

Without looking, then, at all at personal liberty as being under the special protection of the Constitution, or entering upon the higher inquiry into the principles which limit or restrain the Constitution itself, in regard to this and other most sacred rights, this position of the Louisville Reviewer is overthrown by the

mandate of the Constitution in its creation of the Judicial department. An act to deprive the courts of the Writ of Habeas Corpus, or any other writ which is necessary to the exercise of the judicial power, would be an unconstitutional assault upon a co-ordinate department, against the mandate of the Constitution. It would be an insurrection of the creature against its creator. It is grossly illogical to make an unconstitutional power, or an unconstitutional use of power, as the mis-acting or non-acting in such a case would be, the ground of inferring that the Habeas Corpus clause in the Constitution is merely restrictive upon Congress.

3. But if an arbitrary discretion existed in Congress to withhold or repeal the Writ of Habeas Corpus, this would be infinitely short of the suspension of *the privilege of the Writ of Habeas Corpus*. The privilege is a subject totally different from the Writ. The repeal, either total or limited, absolute or suspensive, of the judicial power to issue the Writ, would be the denial or loss of the specific remedy to the prisoner, and nothing more. Grievous it would be undoubtedly, and especially if it proceeded from mere legislative will; but the wrong of an arbitrary imprisonment to the prisoner would remain; the right of the prisoner would remain; and the prisoner's remedy by action for the wrong would remain; and the public remedy for the wrong to the country would remain, by indictment for assault and battery, or for conspiracy, or other public offence involved in the lawless and arbitrary imprisonment. It would not be even an approach to the suspension of the privilege of the Writ of Habeas Corpus, which in the sense in which the Constitution uses these words, and as the States use them in Bills or declarations of Rights, is the suspension by supreme authority of the right as well as the remedy in time of rebellion or invasion, if the public safety requires it.

We deceive ourselves, as has been already said, by analogies drawn from acts of Parliament, in regard to the denial of Bail and Trial. We suffer popular English expressions, in regard to these acts, calling them "suspensions of the Habeas Corpus Act," to lead us astray in the interpretation of the language of our own Constitution.

In this matter of the power of Congress as a legislature, we

delude ourselves by a supposition, that it is by the ordinary power of legislation, the same in Congress as in Parliament, that Parliament does that which is popularly called suspending the Habeas Corpus Act for a limited time. It may be useful to look more closely at what Parliament does in this matter—at its manner of doing it—and at the nature of the power which Parliament exercises in doing it. If we give the subject our attention, it will completely dissipate the vision of an analogy, in this respect, between Parliament and Congress.

Those Imprisonment Acts of Parliament are very different things from suspensions of the privilege of the Habeas Corpus Act. They are not passed in virtue of such powers as exist in Congress, apart from the Habeas Corpus clause, but from much higher and greater, and such as a Constitution of enumerated and limited powers cannot have unless expressly granted; such as the people thought too dangerous to include in the powers of the Federal Constitution; and as the people of no State have thought proper to grant in their State Constitution. The acts of Parliament referred to do not affect to touch the privilege or right of the suspected prisoner, but only the fact of bail or trial, if demanded by him within the time limited. They do not, in terms of any kind, deny or delay, or suspend his right of freedom, or his right to a remedy for the wrong which may be done to him by arbitrary imprisonment. They make particular exceptions to the enjoyment of bail and trial, and they so far arrest that provision of the Habeas Corpus Act which makes this enjoyment general or universal; and they do no more in this respect.

The power by which Parliament arbitrarily denies bail and trial to a prisoner, is that imperial power by which the King and the two Houses of Parliament, the Commons representing the whole people of England, provide for the public safety, as paramount to the existing Constitution, alter that Constitution if they see fit, change the succession to the Crown, substitute new stocks of inheritance, engraft new principles upon the Constitution if the old prove defective, delay and even extinguish constitutional rights, when the public safety demands it. It were idle to say that this is not a constitutional power of the English government. It is part of the English Constitution,

however imperial it may be; and while with consummate caution it is rarely exercised, except in cases of commanding public necessity, to touch any of the great principles and rights, public and private, which form the Constitution in the general apprehension, it does touch both, freely and decisively, upon occasions of great public concern, and especially in cases of combinations to overthrow the Constitution, to destroy the person of the king, or the laws and liberties of England.

All the acts of Parliament, which we have called Imprisonment Acts, and which are popularly called "suspensions of the Habeas Corpus Act," recite that the enactments are necessary "for the public safety," or "to secure the peace, laws, and liberties of the kingdom," or to that effect.

Their first and principal enactment follows pretty much this formula: "That all or any persons that *are or shall be* in prison within that part of the United Kingdom called Great Britain, at or upon the day on which this Act shall receive his Majesty's Royal assent, *or after*, by warrant of his said Majesty's most honorable Privy Council, signed by, &c., for high treason, suspicion of high treason, or treasonable practices, or by any of his Majesty's Secretaries of State, for such causes as aforesaid, may be detained in safe custody without bail or mainprise until, &c.; and that no Judge or Justice of the Peace shall bail or try any such person or persons so committed, without order from his Majesty's Privy Council, signed, &c., until the day aforesaid, any law or statute to the contrary notwithstanding." Examples of this form may be seen in 19 George II, c. 1; 34 George III, c. 50; 38 George III, c. 36; 41 George III, c. 26; 57 George III, c. 3, c. 55.

These statutes say nothing about the privilege of the Writ of Habeas Corpus, nor of the rights of the prisoner, nor of the immunity of anybody for or on account of the arrest and imprisonment, or on account of advising or combining to bring them about: and this is the scope of a Parliamentary "suspension of the Habeas Corpus Act" of 31 Charles II.

Whether, if the Habeas Corpus clause had not been inserted in the Constitution, the power of Congress would have extended to make such enactments as the acts of Parliament referred to, it would be a waste of time to inquire. They are entirely

beyond the scope of such a Constitution as ours. The authority to make them is an exercise of the pre-potent authority of Parliament, which holds the Constitution of England in its arms. But these acts take away no right from the prisoner, but the present enjoyment of personal liberty, and of bail or trial. The complements of such acts remain to another day, when they are followed by what are called Acts of Indemnity—not of compensation—but of extinguishment of all the rights which the arrest and imprisonment may have wronged, and of all claims, demands, actions and proceedings on account of the same. The formula of such Indemnity Acts is the following:

"That all personal actions, indictments, &c., brought or hereafter to be brought, &c., and all judgments thereupon obtained, if any such there be, and all proceedings whatsoever against any person or persons, for or on account of any act, matter or thing by him or them done, or commanded, ordered or directed to be done, since, &c., for apprehending, imprisoning, or detaining any person in custody, charged with or suspected of treason, &c., shall be discharged and made void; and that any person by whom any such act, &c., shall have been done, &c., shall be held discharged and indemnified, as well against the King's Majesty, his heirs and successors, as against the person or persons apprehended, imprisoned, or detained in custody, and all and every other person or persons whomsoever." And the proceedings in suits, prosecutions, &c., instituted, or that may be instituted, are ordered to be summarily stayed. For an example, see 58 George III, c. 6.

These Indemnity Acts are other instances of the pre-potent authority of Parliament working out the safety of England, and the securing of her peace, laws, and liberties, by this exercise of supreme law.

The Imprisonment Acts, it has been remarked, say nothing expressly about the Habeas Corpus Act. Perhaps it may be thought that they do not contradict expressly any principle of the Constitution of England. Magna Carta and the Petition of Right of 3 Charles I, say that no freeman may be taken or imprisoned, but by the lawful judgment of his peers, or by the law of the land; and these Acts of Parliament may be said to be laws of the land. But they are not laws in the spirit of

Magna Carta, or of the Petition of Right, or of the Resolutions of 1628. There are no laws, principles, or acts of Parliament, which declare that suspicion of treason or treasonable practices shall be lawful cause of imprisonment and denial of bail; and these Imprisonment Acts themselves do not enact or declare that suspicion of treason or treasonable practices, shall be lawful cause of imprisonment in the case of the prisoners, who they say may be detained in custody without bail or trial. They are in substance sentences of imprisonment for a cause unknown to the laws of England, and are opposed to the letter as well as to the spirit of the first resolution of the House of Commons in 1628, adopted upon the motion of Sir Edward Coke, which asserted that no freeman ought to be committed or detained by command of the King or Privy Council, or *any other*, unless some cause of commitment or detainer be expressed, *for which by law he ought to be committed or detained;* and against the spirit of the second resolution, which asserts that the Writ of Habeas Corpus ought to be granted to every man that is committed or detained by the King, the Privy Council, *or any other.* The prisoner is not denied the Writ of Habeas Corpus, but he is denied the fruit of it,—bail, trial, or discharge. The acts are a positive authority to detain individuals in prison by warrants of the Privy Council, which do not express a cause of commitment or detainer, for which, by law, he ought to be committed or detained without bail; and they implicitly deny to the prisoners the benefit of the Writ of Habeas Corpus, which was the sole and exclusive meaning of the second resolution of the Commons.

Yet no subject of England can make a question of the validity of these acts, and their conformity to the Constitution of England in that high and imperial principle which provides for its own safety. At the same time, the Commentator of the laws of England, has shown the nature of that principle, and the source of it. His words are these:

"But the happiness of our Constitution is, that it is not left to the Executive power to determine when the danger of the State is so great as to render this measure expedient; for it is the Parliament only, or the Legislative power, that whenever it sees proper, can authorize the Crown, by suspending the Habeas Corpus Act for a short and limited time, to imprison suspected

persons, without giving any reason for so doing. As the Senate of Rome was wont to have recourse to a dictator, a magistrate of absolute authority, when they judged the republic in any imminent danger." 1 Black. Comm., Book I, 136. It is the power of the Dictator—of absolute authority, which is lodged in the King, and in the Estates of the Realm assembled in Parliament, and is thus used in times of imminent danger for the safety of the Kingdom and of the Constitution; and it is the same absolute power which indemnifies the wrongdoer, and extinguishes the wrong itself, and the private right to compensation for it, and the public right to redress for the wrong done to the public by a combination to commit wrong. The Parliament of England is perfectly conscious of the principles of English Liberty, and of the bearing upon them of these enactments; but the same imperial power which puts them aside for the season, silences all attempts to raise a claim for the violation of them.

This is the state of the law and practice of Habeas Corpus suspension in England. The principles of personal liberty, and the acknowledgment of them by the Constitution, would be called, in the absence of the Habeas Corpus clause, the same in the two countries; at least nobody has hitherto been found to assert that they are less or narrower in the United States than anywhere else, or that they enter less into the Constitution of the United States, or are less secure under it, or that the powers of the Government of the United States are less limited or controlled by them. And if this is so, then before a power can be asserted for Congress, in the absence of such a clause, as the Habeas Corpus clause, to delay, deny or suspend the right of personal liberty by authorizing arbitrary imprisonment for a moment, it is not enough that formal power should be shown to repeal the Writ, it must be shown that the Constitution gives or contains power to silence the right and all its remedies, to extinguish the wrong of invading and defeating it, and to exercise in fine that high and ultimate power of the Senate of Rome, or of the Parliament of England, to take care, *dent operam consules, ne quid respublica detrimenti capiat*—the *Senatus consultum ultimæ necessitatis*—the supreme law of last necessity.

It is extravagant to argue that the Constitution of the United

States, without a Habeas Corpus suspension clause in it, would have authorized Congress or anybody to exercise this ultimate power against the liberty of any man; for no people in any country have more strenuously asserted, from the first days of their colonization, this special right of personal liberty, against the colonial policy of England, and as an exception from the powers of government in all free Constitutions; and nothing has passed more completely into a primary truth, than that the Constitution of the United States is a Government of enumerated and specific powers, confined to the exercise of such powers and their necessary and proper means, all others being reserved to the States or to the people; and consequently that the power *ultimæ necessitatis* does not exist in this limited government, in any form of it, unless in the modified form of the Habeas Corpus clause, which the Louisville writer says gives no power whatever, but only restrains the untrammelled discretion of Congress.

It is unnecessary to quote authorities for this fundamental doctrine. Any person may take the initial chapter of the 2d volume of Chancellor Kent's Commentaries on American Law, and find the assertion of fundamental rights traced historically from the first settlement of our people. Magna Carta, and the Common Law so far as it was applicable to their local circumstances, and the Petition of Right in the third year of Charles I, were birthrights of this people. The Declaration of Rights by the first Congress of 1774 asserted it. From the foundation of the Colony of Plymouth down to the epoch of the Constitution, and continually since, as new States have been added to the Union, the great fundamental right of personal liberty, and the right of Bail and Trial, have been asserted for all freemen of the States, and the imprisonment of freemen without due commitment for legal cause denounced as illegal and arbitrary. This and various other fundamental rights have been declared to be exceptions out of the general powers of government—even in the States, whose powers of government within their own jurisdiction are otherwise unlimited. The Habeas Corpus clause is the only one that gives control of such fundamental rights as regard personal liberty, in times of convulsion, from specific dangers to the public safety.

Judge Story's Commentaries on the Constitution, Book III,

ch. xxiv, give all the adjudications and arguments on the powers of Congress in this behalf. Nothing can be suggested in argument that is more licentious than the position that Congress, in the absence of the Habeas Corpus clause, would have had plenary and untrammelled power and discretion to suspend the privilege of the Writ of Habeas Corpus. Congress have express powers, and the incidental and instrumental powers necessary and proper to carry them into execution. That is the whole extent. The first five words of the First Article of the Constitution, and the last six words of the Tenth and last Amendment proposed by Congress, encircle, and bind in, these enumerated powers as with hoops of steel. The last clause of the Eighth Section of the First Article gives all incidental and instrumental powers, and they would have been implied without it. "It neither enlarges any power specifically granted, nor is it a grant of any new power to Congress, but it is merely a declaration for the removal of uncertainty, that the means of carrying into execution the powers expressly granted are included in the grant. Whenever, therefore, a question arises concerning the constitutionality of a particular power, the first question is, whether the power *be expressed* in the Constitution. If it *be*, the question is decided. If it be not expressed, the next inquiry must be, whether it is properly incident to an express power, and necessary to its execution. If it be, then it may be exercised by Congress. If not, Congress cannot exercise it." 2 Story on Const., 3d ed. sec. 1236–1243. It is not required that the incidental or instrumental power should be strictly and indispensably necessary; nor is it sufficient if the relation of the incident to the principal be so obscure or vague as to be only within reach of the most subtle ingenuity. "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to the end, and which are not prohibited, but are consistent with the letter and spirit of the instrument, are constitutional." Sec. 1255. What a caricature of argument it would be, to allege that the withholding, repealing, or suspending the Writ of Habeas Corpus, is an appropriate means of constituting a judicial tribunal!

The power to withhold, suspend, or repeal the Writ of Habeas Corpus, in the absence of the Habeas Corpus clause, still less

the power by so doing to suspend the privilege of the Writ of Habeas Corpus, does not exist as an express power; and as an incidental or instrumental power, it has not one of these ingredients. In the absence of the Habeas Corpus clause, the end is not legitimate. It is to defeat a fundamental principle of the Constitution, as it would then have stood, and to weaken and incapacitate a co-ordinate department of the Government in the exercise of its judicial power and jurisdiction. It is not within the scope of the Constitution. The scope of the Constitution is to protect, defend, and secure the blessings of liberty, universally, and without exception, unless an exception is declared in the instrument. It is not appropriate, or plainly adapted to the end—even the unconstitutional end of suspending the privilege of the Writ of Habeas Corpus, if the Habeas Corpus clause does not give the power. Repealing, suspending, or withholding the Writ, does not suspend the privilege or right, either of freedom or of remedy. The arrest and imprisonment would be a wrong. They would make the advisers, agents, and parties wrongdoers, and amenable to the law for damages and punishment. The right or privilege existed before the Writ was given by law; it would continue to exist after the Writ was thus suspended by the legislative power.

The Constitution of the United States has, it is true, no Bill of Rights. Such a declaration was proposed in the Convention, and lost by an equally divided vote, in perfect congruity with the common apprehension, that the advantages and mischiefs of such a declaration were about equally balanced. If it were full and accurate, it might save argument in putting down constructive usurpation. If it should be incomplete, it would be a snare to take and destroy all Rights which were not expressly enumerated. If it should be redundant, and include too much, it might trammel Government in the execution of its fair and necessary powers, or injure the rights therein acknowledged, by the doubtful or bad character of their associates. The Federalist, No. 83, investigated the subject of such Bills, and held that they were unnecessary, and even dangerous. Several of the State Conventions expressed a desire, in order to prevent misconstruction or abuse of powers, that further declaratory clauses should be added to the Constitution which they had rati-

fied; and Congress proposed the ten amendments, which stand next to that instrument in our copies of the Constitution. They are explanations, and not additions. They assert what all admit to have been implied in the Constitution itself. They answered the good purpose of giving confidence, and quieting apprehensions.

Judge Story, strongly inclining to regard Bills of Rights as useful in many ways, and making a very able argument for them (sec. 1863–1868), does not point out any of the Amendments as an alteration of the Constitution, though valuable as an exposition of its principles. In the Fifth Amendment, which, among other things, declares that no man shall "be deprived of life, liberty, or property, without due process of law," we see no more than a recognition of one of the great principles of Magna Carta which our ancestors brought with them as their birthright, and which are fundamental rights, incorporated in all our Constitutions, and the invasion of them specially excluded by the limited grants of power in the Constitution of the United States. If the Habeas Corpus clause had not been inserted in the Constitution, and given the power to suspend the privilege of the Writ when the public safety required it in cases of Rebellion or Invasion, no one could have found either word or principle in the Constitution, which could give color to the proposition, that the powers of Congress include the despotic power of suspending the privilege at any time, and for any cause, and that the exclusive power of Congress at this day to suspend the privilege asserted, is not even now derived from the clause, but is saved out of the general powers in the Eighth Section of the First Article. It may be properly called an enormous proposition; for although the Habeas Corpus clause makes such a power comparatively harmless in regard to personal liberty, the argument which makes it a mere restraint in this respect, leaves Congress, if the proposition be true, to be the absolute masters of the country in regard to every other judicial instrument, process, writ or execution by which personal security and property of every description are protected by the Judicial department. It is unnecessary to argue this point further. We shall add but a few words to show that what Governor Randolph contended for, without a word of proof or argument, is in direct conflict with the opinion and design of the Convention, as stated

and declared in that day, in the most formal manner, by a delegate of the Convention to his constituent State.

The only authentic statement we know of, in regard to the design of the Habeas Corpus clause, represents that it was *to give the power of suspension to the Government of the United States*, and not to restrain a power of Congress before given.

Mr. Martin (*Luther Martin*), a delegate from Maryland to the Convention, and an anti-constitutionalist, who did not sign the Constitution, from his apprehension that it would extinguish State Rights, made a Report to the Legislature of Maryland on the 27th January, 1788, giving general information relative to the proceedings of the Convention, and particular elucidation of the principles and clauses he opposed. After noticing the first paragraph of the Ninth Section of the First Article, in regard to the importation of slaves, to which he had objected, his statement proceeds:

"By the next paragraph, the General Government is to have *a power of suspending* the Habeas Corpus Act in cases of Rebellion or Invasion."

"As the State Governments have a power of suspending the Habeas Corpus Act in these cases, it was said there could be no reason *for giving such a power to the General Government*, since, whenever the State which is invaded, or in which an insurrection takes place, finds its safety requires it, it will make use of that power; and it was argued, that *if we gave that power* to the General Government, it would be an engine of oppression in its hands, since, whenever a State should oppose its views, however arbitrary and unconstitutional, and refuse submission to them, the General Government may declare it to be an act of Rebellion, and, suspending the Habeas Corpus Act, may seize upon the persons of those advocates of freedom, who have had virtue and resolution enough to cause the opposition, and may imprison them at pleasure in the remotest part of the Union, so that a citizen of Georgia might be bastiled in the furthest part of New Hampshire, or a citizen of New Hampshire in the furthest extreme to the South, cut off from their family, their friends, and their every connection. These considerations induced me, sir, to give my negative to this clause." (*Secret Proceedings and Debates of the Convention*, p. 67, Albany, 1821.)

No one will doubt Mr. Martin's ability to understand the

design of the clause, and that it was to give to the General Government the power that is in question.

But further, when the vote in Convention was taken, while, upon the division of the clause the delegates were unanimous in affirming the first member of it, "that the privilege of the Writ of Habeas Corpus shall not be suspended," the three States of North Carolina, South Carolina and Georgia voted against the second member, "unless in cases of Rebellion and Invasion, when the public safety may require it." Could they have voted against the clause under the impression that the general and unlimited power was already given to Congress? There is no rational interpretation of the vote, but that the first member of the Resolution was deemed to be declarative of a general prohibition of the power, and a confirmation of the general principle of Magna Carta, and of the Petition of Right, and of all that had been previously declared; and that the second member granted power to the General Government in the excepted cases. North and South Carolina to the day of the Rebellion had no clause in their Constitutions which mentioned the Writ of Habeas Corpus, or the exception. They rested upon the exclusion of all power over the right of personal liberty in their State Constitutions, by the fundamental principles retained in them, South Carolina having repeated, in the Ninth Article of her Constitution, the substance of the thirty-ninth clause of Magna Carta, and North Carolina having given peculiar emphasis to personal liberty in the Thirteenth Article of her declaration, "that every freeman restrained of his liberty is entitled to a remedy, to inquire into the lawfulness thereof, and to remove the same if unlawful, and that such remedy ought not to be denied or delayed."

Finally: in the only judicial reference we know of to the origin of the power to suspend the privilege of the Writ of Habeas Corpus under the Constitution of the United States, the clause in the Ninth Section is alone and emphatically declared to be the source of it.

Chief Justice Taney, in Merryman's case, expressly says: "The clause in the Constitution which *authorizes* the suspension of the Writ of Habeas Corpus, is in the Ninth Section of the First Article."

Thus, then, stand the answers to this first objection, so far as it is said to be supported by the power of Congress to regulate the Courts. It is unnecessary to recapitulate them.

The conclusion results, that the Habeas Corpus clause is not a mere restriction of the powers of Congress, or of any other body, but is a confirmation of the general immunity of freemen of the United States from the suspension of the privilege, and a grant to the Government of the power to suspend it, in the excepted cases. And this we are entitled to say, must have been the sense of the Convention, as it is the sense of the clause, and justifies the derivation by Chief Justice Taney of the authority to suspend the privilege of the Habeas Corpus, from that clause in the Ninth Section of the Constitution.

It is hardly necessary to notice on this point other Reviewers of the Tract on "The Privilege of the Writ of Habeas Corpus under the Constitution," who, following Judge Nicholas in his opinion, that the Habeas Corpus clause is merely restrictive of the power of Congress, and is not a grant of power to anybody, differ from him as to the particular power of Congress, under which the privilege may be suspended.

It is clear from the preceding remarks, that the mandate of the Constitution covers the whole judicial power, and the Federal Courts, from the arbitrary discretion of Congress universally, in respect both to the judicial power, and the necessary means of exercising and administering it. If Congress can under any power take away the necessary Writs, by the same power they can annihilate the Judicial department. The power does not exist anywhere, because the judicial power is independent of Congress, and is constituted directly or indirectly by the Constitution itself.

It profits not, therefore, the covey of reviewers from the Philadelphia Bar, which has been flushed and put upon the wing, by the Tract on the Privilege of the Writ of Habeas Corpus, to look about for some other branch of Congressional power to alight upon, with more security than the Louisville reviewer. There is no choice left. All the branches are cut away by that mandate of the Constitution which ordains the constitution of tribunals to administer the whole judicial power. The question

of the Writ of Habeas Corpus, is a question of the judicial power. No power of Congress can mutilate that department.

But it may not be without local interest at least, to see how the mere restriction of the Habeas Corpus clause has been defended by other critics.

In asserting the same construction as the writer just noticed, that the Habeas Corpus clause is altogether restrictive, and not a grant of power, another Reviewer* gives Governor Randolph a compliment in exchange for his opinion on the source from which Congress derives the power of suspension, and rejects his opinion.

Whether the Reviewer's argument against Governor Randolph's selection of the power is conclusive for the reason he alleges, is perhaps not clear; but this is altogether a collateral matter, foreign to the present question, and will not be considered. The Reviewer rejects Governor Randolph on this head, and that is sufficient. He proceeds to say that,—

"While the opinion of Governor Randolph is entitled to as much weight as that perhaps of any one who has ever expounded that instrument, it is contended, that in this instance, he has fallen into an error as to the clause under which the power of suspension is granted."

"A different interpretation, and, with all due respect for the opinions of Governor Randolph it is suggested as being a much more reasonable one, is this: that the authority to suspend the Habeas Corpus is conferred under the power *to provide for the suppression of insurrection and the repelling of invasion.* This inference is supported by English analogy. The power was usually exercised under these circumstances by Parliament. It springs from the necessity recognized as existing for the suspension under these circumstances; and finally the Habeas Corpus clause implies its grant under the power referred to, by providing that it shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it."

"'Suspension,' 'insurrection,' 'invasion,' are inseparably bound together. Construe the Constitution in this way, and its reading is simple, consistent, and natural."

* Review of Binney on the Habeas Corpus. By J. C. Bullitt. Philadelphia, 1862.

"If, then, it is an error to construe the Habeas Corpus clause as a grant of power, instead of a restriction, all the rest of the argument must fall when it is removed. There might be some reason for asserting that it was affirmative rather than restrictive, if there was no other clause in the Constitution under which the grant of the power of suspension would be properly implied."

It is something to know, that although Governor Randolph's authority as an expounder of the Constitution is immensely extolled, it is rejected on the only point to which his exposition applied. It saves any analysis of his pretensions, which would be improper upon such an occasion as this.

The love of English analogy has seduced the Reviewer a little, as has been already shown. It may suffice now to say, that the Imprisonment Acts of Parliament do not recite the least connection between the power they exercise or confer, and the ordinary power of suppressing insurrection. They are made, and they recite that they are made, in the exercise of a vastly higher power, which has never yet been claimed for the Congress of the United States. The power of calling out the militia, is a power of the Crown, and not of Parliament. The power of war, is not a power of Parliament, but of the Crown. So that the analogy fails altogether. Parliament does not more usually authorize imprisonment, without bail or trial, in time of rebellion or invasion, than upon occasions when there is neither. The first instance of such authority in the time of William III, and the last in the time of George III, were made when there was neither. If "suspension," "insurrection," "invasion," are inseparably bound together, the Crown ought to have the power of suspension, and not the Parliament. We must look more closely to English analogies before we permit them to perform so important a part as to interpret our Constitution.

There is more carelessness than was looked for, from this source, in the description of the power of Congress, upon which this writer relies. There is no such power given to Congress as a power to "provide for the suppression of insurrection and the repelling of invasion." If he had more accurately quoted the Constitution, the bearing of the first words might have drawn his attention to the latitudinary construction he sets up. The

power given by the Constitution is a power "to provide for *calling forth the militia*, to execute the laws of the Union, suppress insurrections, and repel invasions." Its primary and predominant object is to keep up, or restore, the full tone of the laws. It is quite characteristic of these efforts to ignore or suppress the operation of the great principles which are alone to settle this question, that while Governor Randolph speaks of the power of Congress to "regulate the courts," and the Reviewer of a power "to provide for the suppression of insurrection and the repelling of invasion," there is no such power in the Constitution as the first, and none like the last, but with adjuncts which defeat his construction. It would be remarkable, indeed, if a power given to Congress to provide for calling forth the militia to *execute the laws of the Union*, suppress insurrections, and repel invasions, was found to contain the germ of an authority to suppress, for a time or season, the great fundamental law of human liberty, the right of relief from arbitrary imprisonment, without a word to that effect! It is the power to provide for the calling forth the militia that is given, and not for the employing them when called forth, which passes immediately to another department; and if the power of suspending the Writ is an incident to the suppression of rebellion, would carry it to the Commander-in-Chief, and not to the authority which provides for the calling forth. Every one of these ends or purposes of calling forth the militia is part of the Executive power; and this convenient elision of the express power of the clause, converts the power of providing for calling forth the militia into the power of commanding the militia, and the army and navy, as well as controlling the courts in the administration of part of their judicial power.

How is the power of suspending the Writ of Habeas Corpus, incident to a power of calling out the militia to execute the laws, suppress insurrection, or repel invasion? How would the power of imprisoning, without bail, persons not insurgents, nor invaders, be an appropriate incident to the power of suppressing insurgents and repelling invaders? A power that aids in the suppression by means of the militia, acts by force, military force, the power of war; and its incidental or adjunct powers

must be of that nature, and tending to the same effect. Such a derivation of the power of suspending the Writ identifies the suspension with military force, and unnecessarily applies it too, for the force that is military can do the same thing without formally suspending the Writ. Indeed, this has been regarded as the case with the military arrest of Merryman, and was the ground of a most able argument, attributed to the Hon. Reverdy Johnson, against Chief Justice Taney's decision, in the weekly National Intelligencer of June 20, 1861.

There is no power given to Congress by the Eighth Section, not even the power "to coin money and to regulate the value thereof," that is beyond the power of application to the suspension of the Writ, by the ingenious surmise of ends, or by the suggestion of means. Congress might suspend the Writ to ferret out a gang of counterfeiters; and it might be very convenient, too, against that occult faculty. The decisive objection to the argument is, that the Writ of Habeas Corpus is an instrument of the judicial power for the remedy of a civil right—the right of liberation from arbitrary imprisonment, the right of bail and trial; and if a power to beat this right down, or to deny it for a season, is to be found among the powers of Congress, it must be sought for among powers which can lawfully control the judicial power, and the means by which it is carried into execution, if there be any such. To suspend the Writ of Habeas Corpus, is to suspend the exercise of the judicial power, to the whole extent that the Constitution has given it. It is an interference of one department with the constitutional powers of another, and against a mandate of the Constitution, and must have some much better authority than loose implication from powers which have an express general end, of a totally different character, and by totally different means.

To such shifts and evasions, to such a "subtle finesse of construction," as Blackstone calls it, do constitutional critics sometimes resort, instead of coming to the great principles which bind every department of Government under the Constitution, and destroy the power of arbitrary imprisonment in every case, unless it is obtained from the gift of the people in the Habeas Corpus clause.

A third Reviewer* is more at large than the last, and much more indefinite and obscure on this point. His proposition is this:

"The second paragraph of the Ninth Section of Article I, like the other paragraphs, contains no grant of power to anybody. It is a *restriction* on power either expressly or impliedly given elsewhere. The Eighth Section is affirmative: it confers certain and very large powers on Congress, which, without the restrictions of the Ninth Section, might well cover the subject of the latter. For instance, the third paragraph of the Eighth Section gives power to Congress to 'regulate commerce,' the first 'to lay and collect duties.' In order, then, to restrict this general authority, the first paragraph of the Ninth Section forbids Congress, prior to the year 1808, from prohibiting the importation 'of such persons as any of the States now existing shall think proper to admit;' that is, negro slaves."

"So in reference to the particular subject we are discussing. Several paragraphs of the Eighth Section authorize Congress 'to declare war,' 'to make rules concerning captures on land and water,' 'to raise and support armies,' 'to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions,' and 'to make all laws which shall be necessary and proper for carrying into execution the foregoing powers,' and then immediately follows the restriction of the Ninth Section: 'The privilege of the Writ of Habeas Corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it.'"

The very first position in the quotation marks the character of the logic which prevails throughout the whole.—

"It is a *restriction on power*, either expressly or impliedly *given* elsewhere." This was the point to be proved—that it was a *restriction* on power *given;* and without making any analysis of the clause, to exhibit some word of restriction or limitation in it, or any analysis of the Constitution, to find a power given to impair the privilege, he takes the restriction and the gift as *conceded*, in the same manner as the Louisville reviewer, and then immediately proceeds to inquire whether the clause was restrictive of the President's power.

* "Remarks on Mr. Binney's treatise on the Writ of Habeas Corpus. By a Member of the Bar of Philadelphia." Philadelphia, 1862.

As no one had opposed him on that point, that is to say, that the President had any such power independently of the clause, he gains an easy victory, and then takes up the power of Congress. He thus leaves the asserted *restriction* unproved in his proposition, and seeks to establish it by groping for a power elsewhere; but never returns to the terms of his proposition a second time.

Not only is the clause totally silent in regard to a power *given* elsewhere, but there is not a word like restriction or limitation in the first member of the clause, nor a word of limitation in the second, except of the power which is *there* given, and not elsewhere. He might as well have said that the commandment, "thou shalt do no murder," is a restriction upon power given or implied elsewhere. Like all other confirmations of a principle, the first member of the clause is prohibitory, not restrictive—it is an exclusion, and not a limitation; and the second member is a relief from the exclusion or prohibition in a special case. The Habeas Corpus clause, in its first member, is the confirmation of a principle which denies power to the Constitution, in the same manner as Bills or Declarations of Rights do, and is no more. The last impliedly affirms and allows an exception to it, and that is all. There is not a phrase or word in the entire clause, which purports to be a restraint upon power before given. There is no compression of what had been expanded, no drawing in of what had been let out. That which the Reviewer therefore was bound to prove, he does not prove, but precisely like the Louisville Reviewer, throws the burden upon his antagonist of disproving it negatively.

This is, however, of less importance, because, fortunately, we get a word from him, in his search for the power of Congress to be restrained, a single word, which resumes upon himself the burden of his proposition; though whether he carries it any better, remains to be seen. He proceeds to say:

"How stands it, however, with Congress in this respect? Says the Constitution, all legislative powers herein granted shall be vested in a Congress of the United States," &c. "Any *legislative* power which exists under the Constitution, is therefore vested in Congress." "Is the suspension of the *privilege* of the Writ of Habeas Corpus properly a legislative or an Executive

Act." "We have quoted above the clauses which give to Congress the power of legislation over the subject of war, insurrections and invasions—they cover the whole of those subjects. Congress has the further powers 'to provide [that is *by law*, because Congress can only provide in this mode] for the common defence and welfare of the United States,' and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, *or in any department or officer* thereof." "If any law be at all necessary to enable the President to execute any power, Congress must pass it, or the President cannot execute the power." "How then stands this part of the case?" "We have as to both the President and Congress no grant of power in this particular clause, unless we do as Mr. Binney does, undertake to 'supply an ellipsis,' which is unwarrantable, except the suspending power would fail of its exercise by reason of the absence of any other *distinct* authorization. In such case, we might properly supply an ellipsis. But if there are other grants of power in the Constitution, which embrace this suspending power, then unquestionably there is no necessity of supplying any supposed omission in the Habeas Corpus clause, in order to attain the object. Now that there are such grants of power, in language amply sufficient to vest the discretion over the subject-matter in Congress, *we think may be safely asserted by any one reading the clauses conferring upon Congress legislative power in the several particulars we have recited above.*"

And here closes the argument that the Habeas Corpus clause "contains no grant of power to anybody," but "is a restriction on power either expressly or impliedly given elsewhere."

It was perfectly just to say that this Reviewer is more at large, and more indefinite on this point, than either of the essays before noticed. He admits the implication of power from the Habeas Corpus clause, "if the suspending power would fail of its exercise by reason of the absence of any other *distinct* authorization;" and by this word, for which we are indebted to him, he resumes again for a moment the duty of his proposition, that the clause is a restriction upon power expressly or impliedly *given* elsewhere. But how does he carry it? He lays it on the table, and pours upon it half a dozen express powers of Congress, not one of which contains the remotest allusion to

the Writ of Habeas Corpus, or even to the judicial power, and saves himself all trouble to show even colorably, how, or by what process a power over the Writ may be argumentatively implied from any one, or the whole of them. If this be the *distinct* authorization he was in pursuit of, his reader is left to judge for himself, whether the Reviewer has found it, or revealed the means of finding it.

It is impossible to treat this argument seriously. The writer has transcribed nearly half the express powers of Congress, and left his readers a perfectly uncontrolled liberty to select one or another, or half a dozen, without the least influence from himself, or an intimation of the slightest preference on his part for one more than for another. Nay, he does not give the least hint of the nature or mode of application of the incidental or implied power, which, according to his notion, arises from any one of these express powers, to suspend the Writ of Habeas Corpus. He names eight express powers, and there are but eighteen in the Eighth Section; and it is true to the very letter, that the member of the Philadelphia Bar neither makes a choice himself, nor writes a word to influence the choice, of one rather than of another of them. He contents himself with saying, "that there are such grants of power, in language amply sufficient to vest discretion on the subject-matter in Congress, we think may be safely asserted by any one reading the clauses conferring legislative power in the several particulars we have recited above." This is not argument, but dogmatism.

If it is allowed to a reader, under these circumstances, to suppose a preference in the writer for one of these powers in particular, the selection would probably fall upon the largest and most indefinite, the power "to provide for the common defence and general welfare of the United States." It looks like a promising power for this purpose; and there seems to fall a breath of emphasis upon it, in the position he has given it, at the close of the enumeration of particular powers. It is easy to imagine incidents of every kind to such a power. But, unfortunately for the Reviewer, there is no such power in the Eighth Section of the First Article, or anywhere else in the Constitution. The writer has merely cut out a clause from the middle of the first paragraph in that section—the power "to

lay and collect taxes, duties, imposts, and excises''—and passed it off as an independent power, to oppress personal liberty. It is not easy to account for such a transformation, as that of converting one of the ends or final causes of a particular power, into a particular power still greater. That excellent work, the Federalist, especially Mr. Madison's paper No. 41, and Judge Story's Commentaries on the Constitution, especially Chapter XIV, sec. 907–920, should in general be read, before a reviewer begins to lecture upon the powers of Congress. His error may perhaps be explained by the fact, that Mr. Jefferson, in his correspondence, did charge upon the Federal party the heterodoxy of making this sort of Cæsarian operation upon the taxing power. It was notoriously untrue of the Federalists as a party, and true only of a fraction of that and other parties. The reviewer may have belonged to that fraction, or may not have left it long enough to have renounced its heresies. The common defence and general welfare are more or less the ends of all the powers in the Constitution; but a particular power of providing for them generally and independently, would have made the Constitution one of general and unlimited, and not of enumerated and specific powers.

It is worthy of observation, that the three writers who have now been referred to as reviewers of the Tract on "The Privilege of the Writ of Habeas Corpus under the Constitution," and have undertaken to show a distinct universal power in Congress over the Writ of Habeas Corpus, have not, in a single instance, looked at the Constitution with sufficient care or clearness of apprehension, even to identify accurately a single express power of Congress, to which the plenary and untrammelled power of suspending the Writ of Habeas Corpus is alleged to be incidental; and no one of them, except Mr. Bullitt, has, in a single instance, attempted to develope the instrumentality of the power of suspension even to the mutilated express powers on which they have respectively placed reliance. The objection and the answers to it will be left here.

Assuming that the objection has been answered, the result of the refutation is, that the power is given by the Habeas Corpus clause, without expressly saying which department shall exercise

it, and with no implication in favor of one more than of the other, except as the conditions on which the power may be exercised carry it with more reason, or with better effect, to one than to the other. That they carry it to the President, is the argument of the Tract upon "The Privilege of the Writ of Habeas Corpus under the Constitution;" and there is no intention to repeat that argument. But it must be remarked, that when it is assumed or admitted that Congress do not possess elsewhere than in the Habeas Corpus clause, any power to suspend the privilege of the Writ, it is assumed or admitted, at the same time, that Congress have no power that assists to obtain it from the clause, other than what the clause expresses or implies. If the clause implies that the power of suspension is to be exercised only by a legislative act, that is quite sufficient to give the power of the clause to Congress; if, on the contrary, the clause implies that it is to be exercised by an Executive act, then the fact that Congress is the body by which the Writ of Habeas Corpus, or a Habeas Corpus Act, may be or has been created, has no tendency to assist Congress in obtaining the power of suspending the privilege of the Writ. It would be a great misapprehension to suppose that the Tract referred to relied upon any difference between the privilege and the right. The word "privilege" in the clause distinguishes the thing that may be suspended, not from the right, but from the "Writ" itself, and from a "Habeas Corpus Act," which expressions, being significant of a legislative creation or enactment, might, if either of them had been used, have supported the construction that the clause required the act of a legislative body; whereas the word "privilege" raised the subject above legislative powers, and placed it on the foundation rock of the Constitution, from which the Habeas Corpus clause alone removes it to the foundation of the public safety. The whole power of suspension is therefore in the Habeas Corpus clause, and whether that gives a legislative or executive power will be left where the Tract placed it.

There remain the other objections, intended to be of a persuasive character, to show the meaning of the Constitution that Congress alone were to exercise the power of the clause; and to these some remarks will be offered in reply.

OBJECTION II.

That the President has not generally under the Constitution the means to arrest a suspected traitor or rebel, and therefore cannot suspend the privilege of the Writ of Habeas Corpus, is not of the first order of logical proofs, that the Habeas Corpus clause did not mean to give him the power of suspension. The Louisville writer first referred to, touched this point with only a short denial, and without any attempt to prove the President's general incapacity to issue a warrant of arrest. Another writer adverts to it more largely, and attempts to prove it by citations from English law, which leave the power of the first Magistrate in England, in like case, untouched.

The only logical form of the objection would be, that because the President cannot use the means of arrest generally, therefore the clause did not mean to give him a power which depends upon them in a particular case—a proposition which would betray its own weakness. If the clause intended to give him the power of suspension, the means necessarily follow, if they did not exist previously. The question of general means is irrelevant to the question of intention. The particular means and the power are one and the same question. If the power was intended for the President, the means follow, whether the general means existed before, or did not.

OBJECTION III.

The debates in the State Conventions which ratified the Constitution, have been cited to prove, that the Habeas Corpus clause was adopted as meaning that Congress alone received authority from it to suspend the privilege of the Writ.

Mr. Madison is supposed to have expressed a preference for the debates in these State Conventions, above the debates in the General Convention, as interpreters of the Constitution; and his preference is thought to appear in a speech in Congress in 1796, of which an extract has been given in one of the pamphlets on this subject, in these words: "After all, whatever veneration might be entertained for the body of men who framed our

Constitution, the sense of that body could never be regarded as the oracular guide in expounding the Constitution. As the instrument came from them, it was nothing more than a draft of a plan, nothing but a dead letter, until life and validity were breathed into it by the voice of the people speaking through the several State Conventions. If we were to look therefore for the meaning of the instrument beyond the face of the instrument, we must look for it, not in the General Convention, which proposed the Constitution, but in the State Conventions which accepted and ratified the Constitution."

Mr. Madison no doubt entertained the sound opinion that we were to look for the meaning of the instrument to its face, and not to what was said in any Convention concerning its meaning; but if he meant to say absolutely that what was said in State Conventions, was any better proof of the meaning, than what was said in the General Convention, it is not very easy to admit it. The instrument proposed was the identical instrument which was ratified; the same in all the Conventions. The *debates* in the State Conventions did not breathe life and validity into it. It was the ratifying vote. What was said in the State Conventions, was not the instrument ratified, any more than what was said in the General Convention, was the instrument proposed. The clauses in the instrument spoke for themselves, both when they were proposed, and when they were ratified. There is not a shade of difference in favor of the debates in the State Conventions. If the proposer is more likely to know his own meaning, than the interpreter, and as likely to express it accurately as the interpreter is likely to construe it accurately, the difference would be the other way; but the fraction of difference is not worth a contest. The true rule is stated by General Hamilton in his argument upon the constitutionality of the Bank: "Whatever may have been the intention of the framers of a Constitution or a law, that intention is to be sought for in the instrument itself, according to the usual and established rules of construction."

But although debates, or what delegates said in debates, in either Convention, cannot affect the construction of the instrument, it is not equally clear, that the established rules of construction, do not permit a resort to the votes of the General

Convention to explain a doubtful clause, when they reveal a mischief in existing provisions of law, or in clauses proposed, which the body rejected, or refused to adopt. For instance, Mr. Pinckney proposed formally a resolution, to make the suspension of the Writ an act of the Legislature; and it seems to have been taken from the words of the Massachusetts Constitution of 1780. "The Privilege and benefit of the Writ of Habeas Corpus shall be enjoyed in the most free, easy, cheap, expeditious, and ample manner; and shall not be suspended by the Legislature, except upon the most urgent and pressing occasions, and for a limited time, not exceeding twelve months;" and the General Convention rejected it for the Habeas Corpus clause, as it stands in the Constitution. This was not the language of debate, but a specific proposition, containing limitations which the Convention rejected by that clause. It is not clear that it is not competent, by established rule, to regard the rejected proposition, and the Massachusetts limitation, as mischiefs to be avoided by the clause. In the formation of organic law, the mischief intended to be remedied cannot well be ascertained in any other way than by referring to examples of a different law, which was rejected. But undoubtedly the safer and better course, is to derive the interpretation from the clause itself, which contains the means of its own construction, in connection with the entire body of the Constitution.

Nothing can be less consistent with settled rules of construction, than to produce what A. or B. said in a State Convention, about the interpretation of this clause; and most especially to apply it with the boundless license which has been taken by the writer, who has produced the instances. When Mr. Martin reported to the State of Maryland, that the question was about giving the power to *the general government*, it is said that he meant Congress; and when a delegate in a State Convention, used Mr. Martin's very language in regard to the clause, the same writer understands him to have meant Congress; and when other delegates said that the power was given to Congress, the writer understands them to have meant Congress, and *not the President*. The answer to all this is, that not only was it the language of debate, which has no authority in it, but it was language which had no reference to the point, whether the

power was given to Congress or to the President. There was no such point raised in the State Conventions. There was no such amendment proposed in the State Conventions, or by any of the States, or by Congress afterwards, as that the power should be given to Congress expressly or exclusively. It would be singular if we must now interpret the Constitution in the supposed sense of these debates, when there has been neither administrative nor judicial practice in execution of the clause to be interpreted, while it seems to have been the judicial opinion of at least one eminent person, that a practice of more than sixty years, with concurrent opinions of the highest order to sustain it, could not interpret the Third Section of the Fourth Article, which gives Congress power "to make all needful rules and regulations concerning the Territory and other property of the United States."

OBJECTION IV.

The Biils or declarations of Rights in the State Constitutions, even if they spoke a uniform language and design, are no proof of the meaning of the Habeas Corpus clause in the Constitution of the United States. They are prepared with reference to States, and not to a National Government. Some of them express, together with fundamental axioms of free government, opinions on political economy, expediency, and administration, perhaps questionable, and certainly out of place in Bills of Rights. The material consideration is, that in these matters each State speaks for itself, and not for another State, or for the United States, and in reference to its own jurisdiction, which is unlimited within its borders, except so far only as portions of it have been granted to the United States. That field is also a narrow one, compared with the great field of the Union. The Executive power in the States is generally more subordinate to the Legislature, than the Executive of the United States is to Congress. The field of the Executive of the States, is uniformly much more limited. The Legislature of a State is moreover convened and directed with comparative promptitude and ease. The offences against the State authority, whether re-

bellion or insurrection, are circumscribed in their extent, and may be more easily surrounded and suppressed; and when they become so enlarged as to extend to the United States, the State relation to them is absorbed by the superior power, and the constitutional powers of the States are only assistant and not directory in the general conflict. Further, in regard to the suspension of the privilege of the Writ of Habeas Corpus, the States speak for their own jurisdiction, and not for the jurisdiction of the United States; and their concern is with what may answer for the State, for its means of action, and for its ends and purposes, and not with what regards the whole nation. The Legislature of a State, from the facility with which it may be assembled, and from the extent of its powers, when assembled, may be competent to do all that it is necessary to do for the suppression of insurrection and rebellion or invasion, and for the suppression of conspiracies to support or assist them. The States model their constitutional powers to suit their own condition and purposes. The form and bearing of their State declarations of Rights, have no influence upon the interpretation even of similar clauses in the Constitution of the United States. The difference of means, modes of operation, jurisdiction, ends, and designs, might justly call for different interpretations of the very same clauses in the Federal and State Constitutions.

But if it were otherwise, the differences in the States themselves, and especially on the subject of the privilege of the Writ of Habeas Corpus, are such that there is no uniform bearing of them on the clause in the Constitution of the United States.

Three of these State Constitutions, to wit, Maryland, North Carolina, and South Carolina, have no express clause whatever in regard to the suspension of the Writ. The probable construction of these Constitutions, is, that the suspension stands prohibited absolutely.

Two of the States, Virginia and Vermont, prohibit the suspension expressly and absolutely.

Two of them, Massachusetts and New Hampshire, give the power of suspension to the Legislature.

Two of them, Connecticut and Rhode Island, dispose of the subject as will be presently mentioned.

The rest of the States have the clause, in the same, or substantially the same, form as it is in the Constitution of the United States. To say what they mean, even in regard to their own States, is to beg the question in dispute.

Connecticut and Rhode Island, which were Charter governments for years after they belonged to the Union, framed Constitutions in 1818 and 1842, respectively, and adopted, as far as it goes, the clause as it stands in the Constitution of the United States, but with a remarkable addition in each instance. Connecticut added the words, "nor in any case but by the Legislature," and Rhode Island added the words, "nor ever without the authority of the General Assembly:" so that each of these States, perceiving that the Habeas Corpus clause in the Constitution of the United States carried the power to the Executive, or that it was doubtful whether it did or did not, added a clause which in effect restored the terms of Mr. Pinckney's proposition, and the article of the Massachusetts Constitution, which the General Convention refused to adopt. Connecticut and Rhode Island saw fit to give the power to the Legislature expressly, as they had a right to do. Let this last go for what it is worth. In admitting that this proves nothing to silence the claim of Congress to the power of suspending the privilege of the Writ, if the face of the clause, in connection with the whole instrument, makes that the true interpretation, it proves that the States, speaking on this subject for themselves respectively, say nothing to affect the interpretation of the clause in the Federal Constitution.

OBJECTION V.

Most of the States have declared the same principle in regard to the suspension of laws, as the English Bill of Rights, in the first Parliament summoned by William and Mary. In the State declarations, it assumes some variety of form, but all are substantially the same in meaning as the English Bill of Rights: "that the pretended power of suspending of laws by regal authority, without the consent of Parliament, is illegal." The principle, moreover, though not declared in the Constitution of

the United States, rules every department of that Government. It asserts the authority of law over the personal will of the Executive, and of everybody.

But it passes comprehension, that if the Constitution gives authority to the Executive to suspend a particular law, or right, or privilege, it is a violation of that principle in the Bill of Rights, and therefore illegal. The Constitution expresses the highest possible authority for all that it ordains, the authority of the whole people, the great Legislature of the Nation, the enacters of its organic law. There are instances of the same power under the Constitution to suspend or vacate the execution or operation of laws by the Executive power. The power of pardon is an instance of that kind. So is the power of removal from office. The former is expressly given by the Constitution. The latter is constructively given; and was settled in conformity with Mr. Madison's views in 1789, in the very dawn of the Government. The principle is not a restraint upon the Constitution, but upon the agents of the Constitution, so far as they are not liberated from it by the Constitution itself.

The very word which the Constitution has used in the Habeas Corpus clause—"suspended"—derives its political or constitutional meaning from the practice of arresting the operation of law by *Executive* authority, without the consent of Parliament. It has been used immemorially to denote this act of temporarily suppressing the operation of law by Executive Will. It was so used in all the contests on the subject between Charles I and the Parliament. It is so used in the English Bill of Rights, from which the State Bills or Declarations of Right take it. It has more adaptation, in the Habeas Corpus clause, to the Executive function, than to an enactment by Congress. The power of the Legislature over the Writ of Habeas Corpus, was limited by its duty in the constitution of the Judicial department. Congress could not, by its legislative powers, withhold, suspend, or repeal the Writ of Habeas Corpus, without disobeying the mandate of the Constitution. When, therefore, the Habeas Corpus clause makes exceptions of cases in which the suspending power may be exercised, the word "suspended" points rather, if not exclusively, to the Executive power, as

liberated from the general restraint in the excepted cases. The suggestion of this principle in the State declarations of Right, tends therefore to confirm the President's authority, rather than to annul it.

The design and end of the power to suspend the privilege have not been specially regarded in any of the criticisms upon the Tract, so far as they have come to the knowledge of the writer; and it is these which induce him to give a little more development to a remark upon that part of a paper in the Federalist which justifies the grant of the pardoning power to the President—that its reasoning is as applicable to the power of arrest and detention in time of rebellion, as it is to the power of pardon.

The design and end of a law, and especially of an organic law, are matters of necessary attention in the interpretation of its meaning, and of the most lawful and usual resort. If one interpretation tends to disappoint the design and to defeat the end, and another to effectuate both, there can be no hesitation in the choice. The established rules of interpretation rigorously exact a preference of the latter.

The power of suspension is designed for cases of the highest possible danger to the Nation; danger which permits no delay; danger so great and so immediate, that the inestimable right of personal liberty is regarded as secondary to it: and, in cases when the personal liberty of individuals, in the judgment of the Executive officer, endangers the public safety, it deprives them of it for a time, without legal accusation, at his instance, as the guardian of the Constitution. It is to his judgment that the effectual act of suspension, that is to say, the arrest and imprisonment, are ultimately referred in England, and must be referred in the United States, whether the President be the primary or the secondary power.

It is preposterous to suppose, as one writer does, that somebody, not the President, may be selected by Congress to execute the power. The doctrine that Congress can in any event choose another Executive, when the President is in office, is revolutionary. The President, in any event, must practically, as well

as officially, execute the power; and whether the Constitution gives, or Congress authorizes him to exercise it, the power, the discretion, and the danger are the same.

Constituted as our Government is, such a power in the Legislature as that of suspending the privilege of the Writ, is particularly weak and inefficient. There are too many probabilities that it will never be exercised by Congress in cases of rebellion, of whatever emergency. It is quite certain that it can never be exercised effectually by that body.

Rebellion against the Government divides the people. We required no example of it to show this. It is far above insurrection in its aims, and vastly more diffusive in its spirit; and the General Convention knew as much about it as we do. When the object is to overthrow the Government, neither rebellion nor invasion can ever show its face, until it has prepared copious means of attack, and a great line of division is drawn between the people of the States, to the end of assailing the Government in its most accessible part, and at the time of its greatest inertia, when, as it were, its powers are at one of the dead points, a change of administration, or the departure of what is called one dynasty and the accession of another. Such a great division, like every other capital fracture, makes its rifts and cracks on each side of the principal line, penetrating extensively into the country, and making large margins of discontent both ways and in all directions. As rebellion will have its election of the time, Congress will never be in session when the train is fired. From the great extent of the country, it will always require months to convene that body. When convened, it must become the centre of all the agitations by all the constituencies, political party on general subjects mixing with open or concealed sympathy on the question of rebellion, and excited by the most exciting of all topics, the topic of personal liberty, which is naturally and justly made a subject of universal concern, the instant that it is proposed to deal with it discretionally, in a single instance, and especially to turn it over with nothing but a shadow of responsibility, from Congress to the President.

Our forefathers knew all this as well as their descendants do: and if they looked for a suspension of the privilege of the Writ of Habeas Corpus only by Congress, they must have regarded

the history of the English Nation from the time of the Habeas Corpus Act of Charles II, with less attention than they regarded the practice of Parliament, though they knew that history as well as we do, and probably much better, as it touched them more nearly; and they must also have had a faith in the action of Congress, in times of rebellion and invasion, which at least they did not express, though a single word in the Habeas Corpus clause would have expressed it, and when the very word was proposed, but rejected by seven States against three.

There is no case better than the case of the first rebellion against the Government, to illustrate and prove what is thus suggested.

The necessary inefficiency of such a body as Congress for such an emergency, can never be more thoroughly demonstrated.

When the present rebellion broke out, the Government was at one of its dead points. The division line included the centre of the Federal power, and the possession of that centre was, and must necessarily have been, the very first aim of treason, to break or derange its connection with all parts which remained faithful to the Union. Though the mass of the people of the District of Washington may have been loyal, the district was the centre of treason, almost as much as it was the centre of lawful power; and this is the danger that has always been anticipated, when the subject of disunion has been canvassed,—a separation of the States by geographical lines, and a contest for the power of the Union in its very heart. What could Congress do in this respect to seize at such a time the threads of a great conspiracy in the centre of the Nation, and to trace its clue to the bottom, in parts of the Union, which to all appearance were as yet generally sound? Under that interpretation of the Habeas Corpus clause, which gives the power to Congress, that body is incompetent to make a previous provision of law for such a purpose. It is not Rebellion or Invasion that is to be provided for. It is the special danger to the safety of the Nation from the particular circumstances of either; and if Congress must be the judge, they cannot delegate the judgment, but can only appoint the Executive power, after Congress have formed and declared the judgment. That body is therefore completely incompetent to act or to authorize suspension, until the danger

is already developed and in action; and then, for the great object of the clause, the safety of the Nation, it will be too late.

The argument for the exclusive power of Congress, seems therefore to end, exactly where the minority in the Convention wished it to end,—that there shall be no suspension of the privilege of the Writ in any circumstances; and to that end it is probable it will come, if the President cannot exercise the power.

The absence of lawful power in the Crown and Privy Council of England may be supposed to be an example for us, and of the sufficiency of the Legislative power; but it is well to attend to the facts which are developed by that history.

The history of England since the date of the Habeas Corpus Act of Charles II, is the fullest authority for the inefficiency even of Parliament, by its imperial power, to supply to the Government the effectual means of safety against the treasons and conspiracies which attend the first preparation and outbreak of rebellion, or other combined attack upon the safety of that Kingdom. Yet England has particular facilities from the moderate extent of the island, and the constant subsistence of the power of the Crown, to convene Parliament on short notice, and of the ministry of the Crown, to execute its purposes.

Now it happens, and has happened constantly from the passage of that Habeas Corpus Act, that although neither King nor Privy Council can claim the least constitutional or legal authority to arrest a suspected traitor, or to detain in custody a suspected traitor or conspirator, before an Imprisonment Act has been passed, there is no instance of such an Act, in which *previous arrests* by the Privy Council, or Secretaries of State, are not adopted and protected, even up to the day and moment of the assent by the King to the Imprisonment Act itself. It is the universal course of Parliament, springing from the invariable necessity of suppressing conspiracy by instant arrest and custody of the conspirators, as soon as they are discovered, and before they have had the opportunity of making their fatal spring upon the Government. There is no exception to the practice of the Crown in this respect. In the present session of Parliament it is reported that Earl Russell spoke of it in the House of Lords, as the usual course of the Privy Council, to

arrest before the authority is given. The previous exercise of the power by the Privy Council or Secretaries of State, is wrongful; yet the wrongful exercise of the power saved the life of William III in 1696, and frustrated an invasion of England by France, then watching from the opposite shore the effect of Barclay's plot. In that case, the King told Parliament that he had gone beyond his lawful authority, and Parliament thanked him for it. The ministers of the Crown, day by day on that occasion, seized and detained in secret and separate custody, one after another, the important conspirators, few or none but Sir George Barclay himself having escaped, and thus saved the life of the King, and frustrated the designs of the enemy, and of the Pretender to the Crown. Parliament were in session at the very moment; but the least movement toward a Bill, or even a secret session of the Houses, would have probably led to the escape of all the conspirators, and to the loss of all the clues to the domestic conspiracy in the Kingdom. From that time down to the last exercise of the Parliamentary power in England, the Imprisonment Acts adopt and protect the previous arrests and imprisonments of the suspected traitors, and a subsequent act of Parliament indemnifies and saves harmless, all who were parties or advisers, equally in previous and in subsequent arrests. England is made safe therefore by the implied promise of these Acts to justify the Privy Council in arrest, and imprisonment, which the Constitution of England does not permit, and which it was the object of our Habeas Corpus clause to justify in times of Rebellion and Invasion. These Imprisonment Acts, uniformly comprehend the prisoners who *are*, or *shall*, before the King's assent to the Act, as well as after, be so arrested by order of the Privy Council.

This is the inability of the Parliament of England to do at the precise and effectual moment, what the imminent danger of the Nation requires. Parliament cannot do it. But their imperial power enables them to destroy the right of action in any prisoner so wrongfully arrested, and to save harmless the parties to the wrong. It is thus that wrong is extinguished by law, though law prohibited it.

If any one can show that there is a power in Congress, under the Constitution, to extinguish the wrong which may be done by the President's endeavoring to save the Nation, without and against warrant of law, and to close all the Courts where redress may be sought for this wrong, he will do more to defeat the construction of the clause which has now been suggested for the safety of the country, than anything that has as yet appeared in the several Reviews, which by concert or party impulse have denied the power of the Executive.